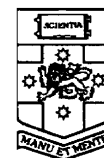


THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

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COAG Counter Terrorism Review Secretariat
Security Law Branch
3-5 National Circuit
BARTON ACT 2600

Dear Secretariat

Submission to COAG Review of Counter-Terrorism Legislation

Thank you for the opportunity to make a submission to the COAG Review of Counter-Terrorism Legislation.

We make this submission in our capacity as members of the Gilbert + Tobin Centre of Public Law at the University of New South Wales and staff of the Faculty of Law, University of New South Wales. We are solely responsible for its contents.

If you have any queries in relation to this submission, or we can be of further assistance, please do not hesitate to contact Prof George Williams AO on (02) 9385 5459 or by email at george.williams@unsw.edu.au.

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I RECOMMENDATIONS

Recommendation 1

Subsection 100.1(3A) of the *Criminal Code* should be amended to provide that an action is not a terrorist act if it takes place in the context of, and is associated with, an armed conflict.

Recommendation 2

Paragraph 100.1(1)(c) of the *Criminal Code* should be amended to provide that an action or threat of action is a terrorist act if it is done with the intention of coercing or influencing by intimidation, ‘the United Nations, a body of the United Nations or a specialised agency of the United Nations’.

Recommendation 3

Paragraphs 100.1(2)(e) and (f) of the *Criminal Code* should be repealed.

Recommendation 4

The words ‘that is physical harm’ should be deleted from paragraphs 100.1(2)(a) and 100.1(3)(b)(i) of the *Criminal Code*.

Recommendation 5

Threats of action should be removed from the definition of a ‘terrorist act’ in s 100.1 of the *Criminal Code*. A separate threat offence should be established.

Recommendation 6

The motive element in paragraph 100.1(1)(b) of the *Criminal Code* should be retained.

Recommendation 7

- (a) The scope of the training offence in s 101.2 of the *Criminal Code* should be clarified by including definitions of the key terms.
- (b) The recklessness offence in subsection (2) should be repealed.

Recommendation 8

- (a) The scope of the offences in ss 101.4 and 101.5 of the *Criminal Code* should be clarified by including definitions of the key terms.
- (b) It should be made an element of the offences that the possession of the thing, or the making or collecting of the document, was intended to facilitate preparation for, the engagement of the person in, or assistance in a terrorist act.
- (c) The recklessness offences in subsection (2) of each offence should be repealed.

Recommendation 9

The maximum penalty attaching to the offence in s 101.6 of the *Criminal Code* should be reduced to 25 years.

Recommendation 10

The term ‘fostering’ should be deleted from paragraphs 102.1(1), 102.1(2)(a), 102.1(4)(b)(i) and 102.1(17)(c)(i) of the *Criminal Code*.

Recommendation 11

Paragraph 101.2(2)(b) of the *Criminal Code* should be repealed. In the alternative, paragraph (c) of the definition of ‘advocates’ in s 101.2(1A) should be repealed.

Recommendation 12

An additional set of criteria – that must be taken into account by the Attorney-General in deciding whether the grounds for proscription have been made out – should be codified in Division 102 of the *Criminal Code*. These criteria should be along the lines of those proposed by Dr Patrick Emerton in 2006 (rather than the criteria currently relied upon by ASIO).

Recommendation 13

An independent statutory committee should be established to advise the Attorney-General prior to him or her making a proscription decision.

Recommendation 14

- (a) Division 102 of the *Criminal Code* should be amended to require general notification of the public in a national newspaper prior to proscription.
- (b) The Attorney-General must disclose sufficient information about the reasons for proscription to enable opposing arguments to be made.
- (c) Division 102 should be amended to require general notification of the public in a national newspaper after an organisation has been proscribed.

Recommendation 15

- (a) Subsection 102.5(1) of the *Criminal Code* should be amended to make it an element of the offence ‘either that the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act’.
- (b) Subsection 102.5(2) should be repealed.

Recommendation 16

- (a) Subsection 102.6(2) of the *Criminal Code* should be repealed.
- (b) The defence in subsection 102.6(3) should be expanded to the ‘provision of legal representation or assistance’ generally.

Recommendation 17

Section 102.8 of the *Criminal Code* should be repealed.

Recommendation 18

- (a) The offence in s 103.1 of the *Criminal Code* should be amended to require intention or knowledge that the funds would be used to facilitate or engage in a terrorist act.
- (b) The maximum penalty for the offence in s 103.1 should be reduced to 15 years (if the fault element is recklessness) or 25 years (if the fault element is intention or knowledge).
- (c) Section 103.2 of the *Criminal Code* should be repealed.

Recommendation 19

Division 104 of the *Criminal Code* should be repealed.

Recommendation 20

- (a) Division 105 of the *Criminal Code* and the State and Territory preventative detention regimes should be repealed.
- (b) In the alternative, any preventative detention regimes should be modelled upon the NSW regime (which includes additional safeguards).

Recommendation 21

If the control order regime in Division 104 of the *Criminal Code* is retained, an express provision should be added to the effect that the person must be given sufficient information (including security sensitive information) to understand and respond to the case for confirmation of the control order. A similar provision should also be included in Division 105 of the *Criminal Code*.

Recommendation 22

- (a) Section 3UEA of the *Crimes Act* should be repealed.
- (b) In the alternative, a number of additional safeguards should be built into the regime, including a requirement that the AFP officer must go before a magistrate or judge as soon as possible after the search has been conducted of obtain an ex post facto search warrant.

Recommendation 23

If the search and seizure provisions are renewed in 2016, a new sunset clause should be included in that legislation. This sunset clause should provide that the relevant provisions cease to exist as at the expiry date (rather than remaining on the statute books). It should also provide for the expiry of the provisions after five (rather than 10) years.

II DEFINITION OF A ‘TERRORIST ACT’ (CRIMINAL CODE S 100.1)

The Australian definition of a ‘terrorist act’ in section 100.1 of the *Criminal Code Act 1995* (Cth) (*‘Criminal Code’*) is more carefully drafted than those of other nations like the United Kingdom and the United States (which do not exclude advocacy, protest and industrial action). However, the definition is not free from complications and omissions, discussed below.

It must be recognised at the outset that the concept of ‘terrorism’ is inevitably open to contest. Put plainly, what some see as terrorism, others see as self-defence or a struggle for liberation. After all, Nobel Peace Prize winner Nelson Mandela was called a terrorist by many during his fight against apartheid in South Africa, including by then British Prime Minister Margaret Thatcher. His past actions would also satisfy the definition of ‘terrorist act’ under Australian law, which provides no leeway for someone who causes harm as part of a struggle for liberation.

A Actions of a Nation as Part of an Armed Conflict

Section 100.1 does not specify whether the actions of the political leaders or armed forces of a nation as part of an armed conflict can amount to terrorism. The definition would seem to include such actions, but a 2007 government discussion paper stated: “[t]errorist act’ would not include action legitimately taken by the armed forces of a country on the international stage in accordance with what they perceive to be their national interests and international law’.¹

In its December 2006 report entitled *Review of Security and Counter Terrorism Legislation*, the Parliamentary Joint Committee on Intelligence and Security (*‘PJCIS’*) recommended that the definition of terrorism be amended to resolve this uncertainty and ensure the distinction between counter-terrorism law and the law of armed conflict is preserved.² To this end, the non-

¹ Attorney-General’s Department, Australian Government, *Material that Advocates Terrorist Acts: Discussion Paper* (2007) 6.

² PJCIS, Parliament of Australia, *Review of Security and Counter-Terrorism Legislation* (2006) [5.42]-[5.48].

government Anti-Terrorism Laws Reform Bill 2009 proposed to insert a new subsection 100.1(3A) to provide that an action or threat of action will not be a terrorist act if it takes place in the context of, and is associated with, an armed conflict, but this was not passed. We would support the making of such an amendment. As well as enhancing clarity, this would prevent the possibility that a person is charged with an offence under both counter-terrorism laws *and* the law of armed conflict.

Recommendation 1

Subsection 100.1(3A) of the Criminal Code should be amended to provide that an action is not a terrorist act if it takes place in the context of, and is associated with, an armed conflict.

B *Recognising International Bodies as Targets of Terrorism*

We believe it would be appropriate to expand the scope of the definition of a ‘terrorist act’ to include an action or threat of action made with the intention of coercing, or influencing by intimidation, the United Nations, a body of the United Nations or a specialised agency of the United Nations. This would respond to Recommendation 11 of the PJCIS’ December 2006 report.³

Recommendation 2

Paragraph 100.1(1)(c) of the Criminal Code should be amended to provide that an action or threat of action is a terrorist act if it is done with the intention of coercing or influencing by intimidation, ‘the United Nations, a body of the United Nations or a specialised agency of the United Nations’.

C *Raising the Harm Threshold*

In order to constitute a ‘terrorist act’, s 100.1(2) requires the action to cause a certain level of harm. The included harms range from the death of a person to serious personal physical harm to serious damage to property to serious interference with an electronic system. In including the latter two harms in the definition of a ‘terrorist act’, Australia has followed the United Kingdom’s example.⁴ However, we accept the argument put forward by Professor Kent Roach that there are ‘real questions whether it is necessary to define all politically motivated serious damage to property or serious disruptions to electronic systems as terrorism’.⁵ It is important to keep in mind that the other aspects of Australia’s anti-terrorism legal framework hinge upon the definition of a ‘terrorist act’. Therefore, the broader this definition, the broader the scope of the terrorism offences and the more intrusive the investigatory powers of law enforcement and intelligence agencies.

Deleting these two categories of harm would also be consistent with Australia’s international obligations. In 2006, the United Nations Special Rapporteur on the Protection and Promotion of Human Rights while Countering Terrorism concluded that conduct should only be criminalised as terrorism where it ‘is accompanied by an intention to cause death or serious bodily injury’.⁶

³ Ibid.

⁴ *Terrorism Act 2000* (UK) Ch 11 s 1(2).

⁵ Kent Roach, ‘The World Wide Expansion of Anti-Terrorism Laws After 11 September 2001’ (2004) *Studi Senesi* 487, 494. See also 493-497.

⁶ United Nations Special Rapporteur on the Protection and Promotion of Human Rights while Countering Terrorism, *Australia: Study on Human Rights Compliance while Countering Terrorism* (2006) 8.

This is the approach that has been adopted in Canada and New Zealand.⁷ The definition of a terrorist act in Canada, for example, only includes property damage where it is likely to result in the death of (or serious bodily harm to) a person, endanger a person's life or cause a serious risk to the health or safety of the public (or a segment of the public). Our primary recommendation is that the property damage and electronic system aspects of subsection 100.1(2) should be deleted. However, failing this, we would recommend the introduction of a qualification similar that to in Canada.

Recommendation 3

Paragraphs 100.1(2)(e) and (f) of the Criminal Code should be repealed.

D *Psychological Harm*

We have supported past proposals to remove the words 'that is physical harm' from the definition of a terrorist act (at paragraphs 100.1(2)(a) and (3)(b)(i)). This would mean simply that the definition of 'harm' in the Dictionary to the *Criminal Code* applies, and therefore these provisions would extend to cover serious harm to a person's mental health caused by an actual or threatened terrorist attack. This change was recommended by the Security Legislation Review Committee ('*Sheller Committee*') in June 2006.⁸ The PJCIS, in a December 2006 report, did not share this view. It was, however, prepared for the Commonwealth Government to consult with the States and Territories on this issue.⁹

We believe a good case can be made for including personal harm in all the forms recognised by the law more generally. Apart from the attraction of consistency within the body of criminal law, the primary aim of terrorist groups is in fact psychological – to instil fear in the community. In most cases, terrorists will seek to achieve their purposes by taking the lives of, or causing serious bodily harm to, individuals. Nevertheless, it is appropriate that the law also recognise the wider harm intended and inflicted by those who peddle political violence. As a matter of practical application, perhaps little is likely to turn on the expansion of the harm element of the definition of 'terrorist act' in Australia. This is because ideally plots will be foiled before a terrorist act is committed, and charges laid in connection with the preparatory stages of a terrorist plan. This has certainly been the case to date. None of the 38 men charged with terrorism offences in Australia (including one in early September 2012) have been charged with the offence of engaging in a terrorist act. Of these, 26 men have been convicted.¹⁰ Furthermore, were a plot to progress to execution, it would be very likely that some physical harm or serious property damage would result. However, it is not totally inconceivable that an act of terrorism could occur without physical victims – a thwarted hostage-taking for example. It is therefore appropriate to extend personal harm beyond merely physical harm.

Recommendation 4

The words 'that is physical harm' should be deleted from paragraphs 100.1(2)(a) and 100.1(3)(b)(i) of the Criminal Code.

⁷ *Criminal Code* RSC 1985 c 46 s 83.01; *Terrorism Suppression Act 2002* (NZ) s 5(3).

⁸ Sheller Committee, *Report of the Security Legislation Review Committee* (2006) Recommendation 6.

⁹ PJCIS, Parliament of Australia, *Review of Security and Counter-Terrorism Legislation* (2006) Recommendation 9.

¹⁰ For a detailed discussion of Australia's terrorism trials, see: Nicola McGarrity "'Testing'" Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia' (2010) 34 *Criminal Law Journal* 92.

E *Threats of Terrorism*

Past government inquiries concluded that criminalisation of the making of a threat of terrorist violence would be better dealt with through a separate offence rather than retention in the definition of ‘terrorist act’ itself.¹¹ However, the 2009 Commonwealth Government National Security Legislation Discussion Paper rejected these calls saying that ‘to remove the ‘threat of action’ from the definition of ‘terrorist act’ dilutes the policy focus of criminalising ‘threat of action’ within the offences in Division 101 of the *Criminal Code*’.¹² In our opinion, it is not clear why the creation of a separate threat offence would diminish the opprobrium towards making threats of terrorist acts. In any event, the government’s statements are an insufficient justification of the status quo given the conceptual difficulty and lack of clarity to which the inclusion of ‘threat’ in the definition of ‘terrorist act’ gives rise.

In the Discussion Paper, the government proposed an alternative approach, namely, to better accommodate threats within the definition by loosening the causal requirements of harm from ‘causes’ to ‘likely to cause’. We oppose this approach. It would have an undeniably expansionist effect on the definition, and on the offences that hinge upon this definition. We therefore continue to recommend the introduction of a separate offence to deal with threats of terrorist violence.

Recommendation 5

Threats of action should be removed from the definition of a ‘terrorist act’ in s 100.1 of the Criminal Code. A separate threat offence should be established.

F *The Motive Requirement*

The definition of a ‘terrorist act’ includes a requirement that the act be done or the threat of action made ‘with the intention of advancing a political, religious or ideological cause’. The Sheller Committee and the PJCIS, both in 2006, recommended that the motive element be retained.¹³ However, in 2009, the Anti-Terrorism Laws Reform Bill proposed that the motive element be deleted.

The justification for deleting the motive requirement is largely based in human rights. For example, in one Canadian case, the judge held that the requirement for proof of a political or religious motive with respect to crimes of terrorism constituted an unjustified violation of the freedoms of expression, religion and association.¹⁴ The removal of the motive requirement has also been justified from a pragmatic perspective. For example, Roach has argued that ‘a focus on the accused’s religion and politics can prolong and distract trials’, and also risks subjecting

¹¹ Sheller Committee, *Report of the Security Legislation Review Committee* (2006) Recommendations 7 and 8; PJCIS, Parliament of Australia, *Review of Security and Counter-Terrorism Legislation* (2006) Recommendation 10.

¹² Attorney-General’s Department, *National Security Legislation Discussion Paper* (August 2009) 49.

¹³ Sheller Committee, *Report of the Security Legislation Review Committee* (2006) 53-57; PJCIS, Parliament of Australia, *Review of Security and Counter-Terrorism Legislation* (2006) 53-57.

¹⁴ *R v Khawaja* [2006] OJ 4245 [73] per Rutherford J. This decision was overturned on appeal: *R v Khawaja* [2010] ONCA 862. Another appeal was argued before the Canadian Supreme Court in mid-2012 and judgment is currently reserved.

the trial itself to accusations of politicisation.¹⁵ Some of the authors of this submission are very sympathetic to these arguments.

However, on balance, a majority of the authors support the retention of the motive element. The effect of deleting this requirement would be to effectively render would-be terrorist acts as ‘normal’ violations of the criminal law, no different in character to traditional offences such as murder, assault and arson. It is the intention of ‘advancing a political, religious or ideological cause’ (combined with the other intentional element of the definition of a ‘terrorist act’ – that the action is done with the intention of coercing a government or intimidating the public) that distinguishes terrorist acts from other forms of criminal conduct. Australia’s counter-terrorism laws (which give expansive powers to intelligence-gathering and policing agencies to prevent and respond to terrorist acts, create broad preparatory offences and impose serious penalties for committing those offences) were justified by reference to the extraordinary nature of the threat posed by terrorism. The gravity of the potential harm and the intention of offenders meant that it was appropriate to enact laws that derogated from fundamental human rights and ordinary principles of criminal justice. We would therefore oppose any attempt to broaden the definition of a ‘terrorist act’ which might potentially extend to less serious forms of criminal conduct which do not meet the description of ‘political violence’. As Professor Ben Saul has pointed out:

Where the political or religious motives of suspects are not known for lack of evidence, violent attacks can always still be prosecuted as ordinary crime, which precludes impunity while ensuring that terrorism is a label reserved for those crimes that are conceptually and morally distinguishable because they involve political or religious coercion of the public or government.¹⁶

Recommendation 6

The motive element in paragraph 100.1(1)(b) of the Criminal Code should be retained.

III PREPARATORY TERRORISM OFFENCES (CRIMINAL CODE DIV 101)

In addition to creating an offence of engaging in a terrorist act,¹⁷ Division 101 of the *Criminal Code* also criminalises a range of preparatory acts connected to terrorism.¹⁸ These preparatory offences expand the existing criminal law considerably. Williams and MacDonald have noted that ‘[w]hilst stopping a terrorist act from taking place must be the aim, there are constraints on the extent to which the criminal law can be used to achieve this without compromising its integrity’.¹⁹

The criminal law has traditionally included a number of ‘inchoate’ offences, namely, attempt, incitement and conspiracy. Prevention of harm is a major rationale of these offences.²⁰ For example, the offence of attempted murder requires the prosecution to establish that the

¹⁵ Kent Roach, ‘The Case for Defining Terrorism with Restraint and Without Reference to Political or Religious Motive’ in Andrew Lynch, Edwina MacDonald & George Williams (ed) *Law and Liberty in the War on Terror* (The Federation Press, 2007) 43.

¹⁶ Ben Saul, ‘The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought?’ in Andrew Lynch, Edwina MacDonald & George Williams (eds) *Law and Liberty in the War on Terror* (The Federation Press, 2007) 34.

¹⁷ *Criminal Code* s 101.1.

¹⁸ *Criminal Code* ss 101.2-6.

¹⁹ Edwina MacDonald and George Williams ‘Combating Terrorism: Australia’s *Criminal Code* since September 11, 2001’ (2007) 16 (1) *Griffith Law Review* 27, 34.

²⁰ *Ibid* 33-35; Tamara Tulich, ‘A View Inside the Preventive State: Reflections on a Decade of Anti-Terror Law’ (2012) 21(1) *Griffith Law Review* 209 (forthcoming).

defendant intended to commit the completed offence and, in furtherance of this intention, acted in a way that is ‘more than merely preparatory’ to the commission of this offence. This offence is punishable as if the substantive offence had been committed.²¹ However, even inchoate offences are not uncontroversial. Debate has long surrounded the appropriateness of allowing the State to preventively intervene to prosecute and punish a person who intends to cause (but has not in fact caused) harm.²²

The preparatory terrorism offences criminalise acts done ‘in preparation for’ or ‘connected with preparation for’ a terrorist act.²³ For example, s 101.6 of the *Criminal Code* provides that a person commits an offence if he or she ‘does any act in preparation for, or planning, a terrorist act’. For this offence, as for the other preparatory offences, there is no obligation on the prosecution to establish that the preparatory act was connected to a *particular* terrorist act. Nor is there any obligation to establish that a terrorist act has in fact occurred as a result of the act.²⁴ The effect of the preparatory offences is to criminalise conduct well in advance of that which would be captured by the inchoate offences (thus creating ‘pre-inchoate liability’).²⁵ Criminal responsibility arises well before an agreement has been reached for a conspiracy charge and well before the person has ‘decided precisely what he or she intends to do’.²⁶ Preparatory offences allow the State to intervene prior to the risk of harm – a terrorist act – developing. They ‘render individuals liable to very serious penalties even before there is clear criminal intent.’²⁷

The breadth of the preparatory offences is exacerbated by the fact that the inchoate offences may attach to them (thus creating ‘pre-pre-inchoate liability’).²⁸ The inchoate offence of attempt, it should be recalled, is ‘punishable as if the offence attempted had been committed’.²⁹ Therefore, the maximum penalty for the offence of attempting to do an act in preparation for a terrorist act is life imprisonment.³⁰

The extension of criminal liability to preparatory offences and pre-pre-inchoate liability involves the criminalisation of acts taken well before, and further removed from harm, than that which is traditionally accepted in Australian criminal law. This is contrary to ordinary principles of criminal responsibility, since people who think in a preliminary or provisional way about committing crimes may always change their mind and not implement their plans. Our concerns about the scope of the preparatory offences are supported by the application of the

²¹ *Criminal Code* s11.1.

²² Edwina MacDonald and George Williams ‘Combating Terrorism: Australia’s *Criminal Code* since September 11, 2001’ (2007) 16 (1) *Griffith Law Review* 27, 33-35; Bernadette McSherry ‘Expanding the Boundaries of Inchoate Crimes: The Growing Reliance on Preparatory Offences’ in McSherry, Norrie and Bronitt (eds) *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart Publishing, 2009) 141.

²³ Edwina MacDonald and George Williams ‘Combating Terrorism: Australia’s *Criminal Code* since September 11, 2001’ (2007) 16 (1) *Griffith Law Review* 27, 34.

²⁴ *Criminal Code* s 101.6 (2).

²⁵ Andrew Ashworth and Lucia Zedner, ‘Just Prevention: Preventive Rationales and the Limits of the Criminal Law’ in Anthony Duff & Stuart Green (eds), *Philosophical Foundations of the Criminal Law* (Oxford University Press, 2011) 285-6.

²⁶ *Lodhi v R* [2006] NSWCCA 121, [66] (Spigelman CJ).

²⁷ Edwina MacDonald and George Williams ‘Combating Terrorism: Australia’s *Criminal Code* since September 11, 2001’ (2007) 16 (1) *Griffith Law Review* 27, 34.

²⁸ Tamara Tulich, ‘A View Inside the Preventive State: Reflections on a Decade of Anti-Terror Law’ (2012) 21(1) *Griffith Law Review* 209 (forthcoming).

²⁹ *Criminal Code* s 11.1.

³⁰ *Criminal Code* ss11.1, 101.6.

laws in practice. As already noted above, none of the 38 men charged with terrorism offences in Australia has been charged with the offence of engaging in a terrorist act. In fact, the most recent three terrorism trials have each involved charges of ‘conspiracy to do an act in preparation for, or planning, a terrorist act’.³¹

A *Training Connected with a Terrorist Act (Criminal Code s 101.2)*

Section 101.2 contains two offences relating to the provision or receipt of training ‘connected with preparation for, the engagement of a person in, or assistance in a terrorist act’. However, neither the section nor the *Criminal Code* more generally provides a definition of ‘training’. Further, it does not specify the degree of connection required between the training and the terrorist act. Would, for example, a commercial flying instructor whose services are used by those who go on to prepare for a terrorist act involving aircraft (such as the 9/11 terrorist attacks) be exposed to criminal liability? It is inappropriate for criminal offences to be so indeterminate; the criminal law should be drafted in such a way that it is capable of guiding the conduct of potential offenders. This indeterminacy is particularly problematic in the context of criminal offences that carry maximum penalties of 25 years (where the person knows of the connection) and 15 years (where the person is reckless as to the connection).

We do not believe that it is appropriate to adopt a recklessness fault element in relation to this (or any other of the preparatory offences discussed below). Recklessness means that the prosecution is not required to prove any intention or knowledge on the part of the defendant that the training is connected with preparation for, engagement in, or assistance with, a terrorist act. Rather, a person is reckless if he or she ‘is aware of a substantial risk’ of the connection and, ‘having regard to the circumstances known to him or her, it is unjustifiable to take the risk’.³² The adoption of a recklessness standard arguably extends this offence beyond what is proportionate to the threat of terrorism, and may result in ‘innocent’ persons being captured by the offence.

Recommendation 7

- (a) *The scope of the training offence in s 101.2 of the Criminal Code should be clarified by including definitions of the key terms.*
- (b) *The recklessness offence in subsection (2) should be repealed.*

B *Possessing a Thing, and Making or Collecting a Document, Connected with a Terrorist Act (Criminal Code ss 101.4 and 101.5)*

Section 101.4 prohibits the possession of a thing connected with preparation for, the engagement of a person in, or assistance in a terrorist act, where the person knows or is reckless as to the existence of that connection. This offence suffers from the same problems as the training offence discussed above. There is no definition of ‘thing’ in the *Criminal Code*, nor is the level of ‘connection’ between the ‘thing’ and the terrorist act specified. Sections 101.5 (collecting or making documents connected with terrorist acts) is similarly vague on the degree of ‘connection’ required. This means that the scope of these offences is indeterminate and arguably goes beyond what is proportionate to respond to the threat of terrorism.

³¹ Nicola McGarrity ‘“Testing” Our Counter-terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia’ (2010) 34 *Criminal Law Journal* 92.

³² *Criminal Code* s 5.4.

Subsection 101.4(5) provides that it is not an offence if the possession of the ‘thing’ was not intended to facilitate preparation for, the engagement of a person in, or assistance in a terrorist act. Unusually, the defendant bears an evidential burden here. This means that the defendant must point to evidence to show that there is a reasonable possibility that the matter is made out.³³ The onus then shifts to the prosecution to disprove the matter. The same evidential burden applies to persons charged under subsection 101.5(5) (collecting or making documents connected with terrorist acts). In our opinion, the fact that a person actually intended to use the ‘thing’ or ‘document’ in relation to a terrorist act is central to his or her culpability. Without this circumstance, a person would be guilty of an offence for possessing a document the person knows is connected (in potentially the loosest sense) with preparation for a terrorist act even if that person had no involvement in the proposed terrorist act. This would include, for example, an academic who downloads a document about a possible terrorist act for research purposes. Given this, it should be an element of the offence that the ‘thing’ or ‘document’ was intended to facilitate preparation for, the engagement of the person in, or assistance in a terrorist act (rather than the absence of this matter being an effective *defence*). In our opinion, it undermines the presumption of innocence for a defendant to be required to disprove an element of the offence, or even to be required to put forward evidence that tends to disprove that element. It is also inconsistent with the Commonwealth’s approach to framing criminal offences.³⁴

Recommendation 8

- (a) *The scope of the offences in ss 101.4 and 101.5 of the Criminal Code should be clarified by including definitions of the key terms.*
- (b) *It should be made an element of the offences that the possession of the thing, or the making or collecting of the document, was intended to facilitate preparation for, the engagement of the person in, or assistance in a terrorist act.*
- (c) *The recklessness offences in subsection (2) of each offence should be repealed.*

C *The ‘Catch All’ Preparatory Offence (Criminal Code s 101.6)*

This offence exemplifies the problems with adopting a preventive approach to the threat of terrorism. It captures an incredibly broad range of conduct – ‘any act’ – without a requirement that it be connected to a *particular* terrorist act. A recent trial of five men before the Victorian Supreme Court demonstrates that even talking about whether it is permissible under Islam to engage in a terrorist act may be enough for a person to find themselves charged with, and then convicted of, the s 101.6 offence.³⁵ In reality, the application of this offence only to those who pose a real threat to Australia depends upon the discretion of law enforcement and prosecutorial officials. Concerns about the breadth of this offence are compounded by the maximum sentence attaching to it, namely, life imprisonment. This is the same penalty that applies to the offence of actually engaging in a terrorist act in s 101.1 of the *Criminal Code*. In recent years, eight men convicted of this offence (or, more accurately, ‘*conspiracy* to do an act in preparation for a terrorist act’) have been sentenced to between 18 and 28 years apiece.

Recommendation 9

The maximum penalty attaching to the offence in s 101.6 of the Criminal Code should be reduced to 25 years.

³³ *Criminal Code* s 13.3.

³⁴ Australian Government, *A Guide to Framing Commonwealth Offences: Civil Penalties and Enforcement Powers* (2004) 27-28.

³⁵ *R v Fattal and Ors* [2011] VSC 681.

IV TERRORIST ORGANISATION REGIME (*CRIMINAL CODE DIV 102*)

The proscription of organisations ‘has long been a central feature of legal regimes aimed at the suppression of terrorism. Australia is no exception’.³⁶ Proscription is intended to ease proof of subsequent criminal conduct, ‘provide a basis for the criminalisation of fundraising and other activities of terrorist groups’, and symbolise the community’s revulsion of terrorist groups activities’, ‘sending a general message to Australians “that involvement with such organisations, either in Australia or overseas, will not be permitted”’.³⁷ However:

Despite the extent of experience in Australia and elsewhere, proscription remains controversial because it raises fundamental questions about public law and the limits of executive power, while also challenging the accepted boundaries of the criminal justice system. Proscription regimes often devolve wide discretions to the government ... with few effective checks and balances.³⁸

Significant objections have been ‘raised as to both the conceptual and practical aspects of the Australian proscription regime’.³⁹ This is largely due to the difficulties of defining terrorism and the impact of proscription on the freedoms of association and political communication.

In our opinion, proscription can be a justifiable response to terrorism. However, we have a number of concerns about the drafting and operation of the Division 102 regime. The proscription of an organisation has serious criminal consequences for individuals involved with that organisation, for example, it enlivens funding, membership, and association offences. Given this, and the fact that proscription furnishes conclusive proof at trial that the organisation is a terrorist organisation, it is critical that the definition of a ‘terrorist organisation’ is precise, and the process by which a terrorist organisation is proscribed is transparent and fair.

There are two means by which an organisation may be classified as a terrorist organisation. First, the organisation may be determined by a jury, in the course of the prosecution of an individual for a terrorist organisation offence, to satisfy the definition in subsection 102.1(1). A terrorist organisation is defined as ‘[a]n organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs)’. In our opinion, this definition is too broad and vague. This issue will be dealt with in section A below. Second, the Governor-General may, on the advice of the Attorney-General, make a regulation listing the organisation as a terrorist organisation. Such a regulation may be made where there are reasonable grounds for the Attorney-General to believe that the organisation falls within the definition above or, alternatively, ‘advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur’ (subsection 102.1(2)). In section B below, we discuss a number of concerns regarding this regime.

A *Definition of a ‘Terrorist Organisation’ (Criminal Code s 102.1(1))*

The definition of a ‘terrorist organisation’ in s 102.1(1) of the *Criminal Code* is extremely broad. The involvement by a terrorist organisation in a terrorist act is not required to be direct,

³⁶ Andrew Lynch, Nicola McGarrity and George Williams, ‘The Proscription of Terrorist Organisations in Australia’ (2009) 37 *Federal Law Review* 1.

³⁷ Attorney-General’s Department, Australian Security Intelligence Organisation, Australian Federal Police and Commonwealth Director of Public Prosecutions, Submission No 10 to PJCIS, Parliament of Australia, Inquiry into the Terrorist Organisation Listing Provisions of the *Criminal Code Act 1995*, 2 February 2007, 2.

³⁸ Andrew Lynch, Nicola McGarrity and George Williams, ‘The Proscription of Terrorist Organisations in Australia’ (2009) 37 *Federal Law Review* 1, 3.

³⁹ *Ibid.*

for example, where the terrorist organisation itself engages in a terrorist act or makes preparations for a terrorist act. The definition also includes ‘indirect’ participation in terrorism-related acts. This might include the provision of materials to another organisation that would assist it to engage in or prepare for a terrorist act.

Perhaps the most problematic aspect of the definition of a terrorist organisation is the categories of conduct that it extends to. It is not limited to conduct related to engagement in or preparation for a terrorist act. It also extends to ‘fostering’ the doing of a terrorist act. There is no definition of fostering in the *Criminal Code*. The breadth of this term is evident from the comments of Bongiorno J during the 2008 trial of Abdul Nacer Benbrika and 11 co-accused in the Victorian Supreme Court. Justice Bongiorno instructed the jury that ‘[f]ostering can be synonymous with encouraging or something of that nature’.⁴⁰ For example, giving public encouragement to the anti-apartheid struggle of Nelson Mandela in South Africa (which is within the definition of a ‘terrorist act’ in section 100.1) may be regarded as fostering the doing of a terrorist act. There has been no case in which the Crown has relied solely upon the ‘fostering’ of a terrorist act as the basis for a claim that an organisation is a ‘terrorist organisation’. This is presumably because of the indeterminate scope of that term. For example, in the 2008 Benbrika trial in the Victorian Supreme Court, the prosecution submitted that the 12 men were part of an organisation which was ‘directly or indirectly engaged in preparing or fostering the doing of a terrorist act’.⁴¹ It is unlikely that deletion of the term ‘fostering’ from the definition of a terrorist organisation’ would have any adverse impact on the ability of the Commonwealth to prosecute individuals for terrorist organisation offences. It would make the definition more precise in scope.

Recommendation 10

The term ‘fostering’ should be deleted from paragraphs 102.1(1), 102.1(2)(a), 102.1(4)(b)(i) and 102.1(17)(c)(i) of the Criminal Code.

B *Proscription of a Terrorist Organisation*

1 *Grounds for proscribing an organisation (Criminal Code s 102.1(2))*

We have already discussed the breadth of the first ground on which an organisation may be proscribed – that the organisation ‘is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)’. The second ground on which an organisation may be proscribed is that it ‘advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)’.⁴² In our opinion, this is an extraordinary and inappropriate extension of the power of proscription. It may well be legitimate to ban groups that actively engage in, or prepare for, terrorism. However, it is not justifiable to ban whole organisations merely because someone within that organisation ‘advocates’ the doing of a terrorist act. It must be remembered that proscription has exceptionally serious consequences for individuals. There are a broad range of criminal offences that hinge upon the proscription of an organisation, including offences that criminalise a person’s status as a member of a terrorist organisation without requiring any additional criminal conduct on that person’s part. It is well-accepted that speech which directly incites a specific crime may already be prosecuted as incitement. It is quite another matter to

⁴⁰ *R v Benbrika* [2009] VSC 142 (8 April 2009). This direction was upheld by the Victorian Court of Appeal: *Benbrika v The Queen* [2010] VSCA 281 [119]-[120].

⁴¹ *R v Benbrika* [2009] VSC 21 (3 February 2009).

⁴² *Criminal Code* s 102.1(2).

effectively prosecute a person for the statements of another; even more so when such statements are general in nature, and not directly and specifically connected to the commission of a terrorist act. We therefore recommend that the advocacy ground be deleted from s 102.1(2) of the *Criminal Code*.

In the alternative, we urge the Review to consider amending the definition of ‘advocates’ in s 102.1(1A). Currently, an organisation ‘advocates’ the doing of a terrorist act if:

- (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or
- (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or
- (c) the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment [within the meaning of s 7.3] that the person might suffer) to engage in a terrorist act.⁴³

A number of inquiries examining this definition have concluded it is too expansive, ambiguous and imprecise, thus posing a considerable threat to the freedom of expression.⁴⁴ This is particularly so with regard to the inclusion of ‘praises’ in subsection (c). Conceivably, this may result in the proscription of an organisation (which may be a company, club or church group) even where: the person who praised the terrorist act is not the leader of the group; the statement is not on official material distributed by the organisation; the statement is not made in public or published; the statement is not accepted (and perhaps is even rejected) by other members as representing the views of the group; the organisation has no other involvement in terrorism; the person praising terrorism did not intend for a terrorist act to be committed; the statement is made in support of previous or prospective terrorist acts; and no terrorist act ever occurs. There need only be a risk that such praise might lead a person to engage in a terrorist act, regardless of that person’s age or mental capacity.

This is likely to have a ‘chilling’ effect upon free speech. It is not hard to imagine that bodies which refer approvingly to the activities of the leaders of national liberation movements, including Nelson Mandela or Mahatma Gandhi, could conceivably fall foul of Australia’s counter-terrorism laws. Many other hypothetical examples come to mind, such as where someone praises past liberation struggles in East Timor or against a colonial power, or current battles in West Papua, the Middle East and parts of Africa. As terrorism is merely a tactic employed by protagonists, there is a risk that those discussing a particular conflict might be seen to condone such activities when addressing the underlying causes of that conflict or expressing sympathy for the position of one side. An example is provided by the controversy which greeted the statement by Cherie Blair, wife of the then British Prime Minister, when she said of the Israeli-Palestinian conflict: ‘As long as young people feel they have got no hope but to blow themselves up you are never going to make progress’.⁴⁵ That comment provoked uproar on the basis that it might be seen as excusing, if not justifying, suicide bombing. An apology was later issued by the Prime Minister’s office.

It is difficult to draw clear lines about what constitutes ‘praise’ and what does not. In attempting to explain the causes of terrorism, organisations such as Red Cross or Amnesty International must take care not to be seen as supporting such activities. Regardless of the merits of specific resistance movements, the inclusion of ‘praise’ in the Australian definition of ‘advocacy’

⁴³ *Criminal Code* s 102.1(1A).

⁴⁴ Sheller Committee, *Report of the Security Legislation Review Committee* (2006) 69-73; PJCIS, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006) 3, 68-71.

⁴⁵ ‘PM’s Wife ‘sorry’ in Suicide Bomb Row’, *BBC News* (online), 18 June 2002 <http://news.bbc.co.uk/2/hi/uk_news/politics/2051372.stm>.

renders it so broad as to attach legal consequences to speech about participants in the many ongoing armed struggles around the world. For these reasons, we recommend that section 102.1(1A)(c) be repealed, as the Sheller Committee recommended in 2006.⁴⁶ We believe this would be preferable to more minimalist amendments which have been proposed in the past – such as inserting the words ‘substantial’ before ‘risk’.⁴⁷

Recommendation 11

Paragraph 101.2(2)(b) of the Criminal Code should be repealed. In the alternative, paragraph (c) of the definition of ‘advocates’ in s 101.2(1A) should be repealed.

2 Additional legislative criteria

The breadth of the grounds outlined above means that a wide range of organisations could be proscribed as terrorist organisations. However, at present, only 17 organisations are proscribed. This is a clear indication that proscription is occurring on a selective basis. If this is the case, then it is important for the criteria guiding this selection to be made clear. The absence of detailed criteria in the *Criminal Code* to guide the Attorney-General’s discretion gives rise to the potential for arbitrary and politicised decision-making, reduces the transparency of the decision-making process and undermines public confidence in that process.⁴⁸

In practice, the Attorney-General relies upon an unclassified statement of reasons prepared by the Australian Security Intelligence Organisation in selecting which organisations to proscribe. This statement assesses the relevant organisation against the following criteria:

- engagement in terrorism;
- ideology and links to other terrorist groups/networks;
- links to Australia;
- threat to Australian interests;
- proscription by the UN or like-minded countries; and
- engagement in peace/mediation processes.⁴⁹

However, these criteria are not addressed in any consistent manner, or given equal weight, by ASIO or the Attorney-General.⁵⁰ In 2005, the PJCIS recommended that ASIO and the Attorney-General specifically address all six criteria in every case, to enhance the clarity and consistency of the proscription process and assist the Committee to perform its review function.⁵¹

We believe that it would be appropriate to incorporate an additional set of criteria into the *Criminal Code*.⁵² These would be mandatory criteria that the Attorney-General must take into

⁴⁶ Sheller Committee, *Report of the Security Legislation Review Committee* (2006) 73.

⁴⁷ PJCIS, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006) 71.

⁴⁸ Andrew Lynch, Nicola McGarrity and George Williams, ‘The Proscription of Terrorist Organisations in Australia’ (2009) 37 *Federal Law Review* 1, 28-31.

⁴⁹ Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *Review of the Listing of Six Terrorist Organisations* (2005) [2.24].

⁵⁰ *Ibid*

⁵¹ Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *Review of the Listing of the Kurdistan Workers’ Party as a Terrorist Organisation Under the Criminal Code Act 1995* (2006), [2.8]. See also *Review of the Re-Listing of Abu Sayyaf Group, Jamiat-Ul-Anser, Armed Islamic Group and Salafist Group for Call and combat as Terrorist Organisations under the Criminal Code Act 1995* (2007) [1.27].

⁵² Andrew Lynch, Edwina MacDonald and George Williams, Submission to the PJCIS, *Review of the Listing Provisions of the Criminal Code Act 1995*, 9 February 2007, 3. See further Andrew Lynch, Nicola McGarrity and

account (although not in any mathematical fashion). The effect of this would be to circumscribe the Attorney-General's discretion in selecting which organisations to proscribe. It would also create greater transparency by informing the public of the reasons why an organisation might be proscribed. Another effect would be to provide for a more meaningful process of judicial review, that is, a proscription decision could be overturned on the basis that the Attorney-General failed to take into account the relevant criteria. We do not believe, however, that the six criteria set out above are adequate. We prefer the alternative criteria set out by Dr Patrick Emerton in a 2006 submission to the PJCIS.⁵³ These criteria are:

- the nature of the political violence engaged in, planned by, assisted or fostered by the organisation;
- the nature of the political violence likely to be engaged in, planned by, assisted or fostered by the organisation in the future;
- the reasons why such political violence, and those who are connected to it via the organisation, ought to be singled out for criminalisation by Australia in ways that go beyond the ordinary criminal law; and
- the likely impact, in Australia and on Australians, of the proscription of the organisation, including, but not limited to:
 - an indication of the sorts of training Australians may have been providing to, or receiving from, the organisation;
 - an indication of the amount and purpose of funds that Australians may have been providing to, or receiving from, the organisation;
 - the way in which the concept of 'membership', and particularly 'informal membership', will be applied in the context of the organisation; and
 - the extent to which ASIO intends to take advantage of the proscription of an organisation to use its detention and questioning power to gather intelligence.

Recommendation 12

An additional set of criteria – that must be taken into account by the Attorney-General in deciding whether the grounds for proscription have been made out – should be codified in Division 102 of the Criminal Code. These criteria should be along the lines of those proposed by Dr Patrick Emerton in 2006 (rather than the criteria currently relied upon by ASIO).

3 *Creation of a listing advisory committee*

We believe that it is appropriate to confer the power of proscription on the executive (rather than the judiciary). This is because of the complex policy issues involved, the confidential information and intelligence upon which proscription decisions are often based and the accountability of the executive branch of government to the Parliament and the people.⁵⁴ The courts are insufficiently equipped to make prompt decisions about sensitive national security issues, especially where much of the information may be inadmissible. Therefore, the making of proscription decisions by the courts may undermine the preventative function of proscription. However, in light of the very serious consequences that flow from the proscription of an organisation, there should be mechanisms to inform and constrain the Attorney-General's discretion. This includes the establishment, in legislation, of an independent advisory committee to provide advice to the Attorney-General prior to him or her advising the Governor-General to make a regulation. We have previously supported proposals to create a listing advisory committee to advise the Attorney-General on the proscription of terrorist

George Williams, 'The Proscription of Terrorist Organisations in Australia' (2009) 37 *Federal Law Review* 1, 28-31.

⁵³ Patrick Emerton, Submission 18 to PJCIS, Parliament of Australia, Review of the Listing of the Kurdistan Workers' Party (PKK), 3 February 2006, 7-8.

⁵⁴ For a more detailed discussion of our position on this point, see Andrew Lynch, Nicola McGarrity and George Williams, 'The Proscription of Terrorist Organisations in Australia' (2009) 37 *Federal Law Review* 1.

organisations.⁵⁵ Such changes were recommended by the Sheller Committee⁵⁶ and proposed in the Anti-Terrorism Laws Reform Bill 2009.

This committee should comprise people independent from the proscription process with relevant expertise in security, law and government. The composition of the Sheller Committee provides a useful precedent: a retired judge as chair of the committee, the Inspector-General of Intelligence and Security, the Privacy Commissioner, the Human Rights Commissioner and the Commonwealth Ombudsman, as well as security experts such as former senior staff of ASIO and the Office of National Assessments. Such a committee would enhance the integrity of the proscription process by providing for expert advice and public consultation. Three of the authors have previously written: ‘The factual findings and recommendations made by the independent advisory body would be of assistance to the Attorney-General in making his or her real decision. However, the real value of the body lies in involving the communication and those potentially affected by the decision making process’.⁵⁷

Ideally, the reports of the advisory committee would be publicly available. In the event that national security concerns make this impossible, an alternative approach would be to require annual reporting of the number of times that the Attorney-General departs from the committee’s advice.

Recommendation 13

An independent statutory committee should be established to advise the Attorney-General prior to him or her making a proscription decision.

4 *Notification, natural justice and publication of proscription decisions*

Division 102 of the *Criminal Code* does not obligate the Attorney-General to notify the general public, or even the relevant organisation and its members, prior to making a proscription decision. In practice, such notification is never given. This means that there is no opportunity for the relevant organisation and its members to be heard on the reasons why that organisation should not be proscribed. This is a fundamental violation of the right to natural justice. Natural justice demands that when a decision that will adversely affect a person’s rights, interests or legitimate expectations, that person is entitled to know the case against them and must be given an opportunity to respond.⁵⁸

The Attorney-General’s Department has stated that ‘providing notice prior to listing could adversely impact operational effectiveness and prejudice national security’.⁵⁹ In our opinion, these arguments are unpersuasive. First, the proscription of an organisation can never be so urgently required that there is no time for prior notification and consultation to occur. This is because proscription does not have any immediate effect. It merely facilitates the prosecution of

⁵⁵ Andrew Lynch, Edwina MacDonald and George Williams, Submission to the PJCIS, Review of the Listing Provisions of the Criminal Code Act 1995, 9 February 2007, 2-3; Andrew Lynch, George Williams, Nicola McGarrity and Ben Teeger, Submission to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Anti-Terrorism Laws Reform Bill 2009, 14 August 2009, 10.

⁵⁶ Sheller Committee, *Report of the Security Legislation Review Committee* (2006) 99.

⁵⁷ Andrew Lynch, Nicola McGarrity and George Williams, ‘The Proscription of Terrorist Organisations in Australia’ (2009) 37 *Federal Law Review* 1, 26.

⁵⁸ *Kioa v West* (1985) 159 CLR 550.

⁵⁹ Attorney-General’s Department, Submission No 10, Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995, 2 February 2007, 13.

individuals for terrorist organisation offences under Division 102. In addition, quite apart from proscription by the executive, an organisation may in any event be found to be a terrorist organisation by a court under subsection 102.1(1). This means that the terrorist organisation offences still apply prior to proscription. Secondly, the information relied upon by ASIO and the Attorney-General in making the decision to proscribe an organisation is usually open source material (in other words, it is publicly available). It is therefore difficult to see how disclosing this information to the relevant organisation or its members prior to proscription would prejudice national security.⁶⁰ Therefore, the *Criminal Code* should be amended to require general notification of the public in a national newspaper prior to an organisation being proscribed. Natural justice also requires that the organisation and its members be given a meaningful opportunity to be heard – whether in person or in writing. In order for this hearing to be effective, the Attorney-General must be required to disclose not only the fact that he or she is considering whether to proscribe an organisation but also sufficient information about the reasons for proscription to enable opposing arguments to be made.

The *Criminal Code* does not even mandate public notification after the making of a proscription decision. It is only by convention that, on the day after a regulation is lodged on the Federal Register of Legislative Instruments, the Attorney-General issues a press release, including a statement of reasons, announcing the listing of the organisation. Indeed, in some cases, even this minimal level of public notification has not occurred. For example, a regulation re-listing the Kurdistan Workers' Party was made on 12 February 2008.⁶¹ The Attorney-General's Department did not issue a media release giving public notice of the re-listing and did not provide a statement of reasons.⁶² The *Criminal Code* should be amended to require public notification of the proscription of an organisation in a national newspaper. Widely publicising a proscription decision will alert people in contact with terrorist organisations of the possibility they may be committing an offence.

Recommendation 14

- (a) *Division 102 of the Criminal Code should be amended to require general notification of the public in a national newspaper prior to proscription.*
- (b) *The Attorney-General must disclose sufficient information about the reasons for proscription to enable opposing arguments to be made.*
- (c) *Division 102 should be amended to require general notification of the public in a national newspaper after an organisation has been proscribed.*

V TERRORIST ORGANISATION OFFENCES (CRIMINAL CODE DIV 102)

A Training with a Terrorist Organisation (Criminal Code s 102.5)

Section 102.5 creates two separate offences. Subsection (1) makes it an offence to intentionally provide training to, or receive training from, a terrorist organisation, being reckless as to whether the organisation is a terrorist organisation. Subsection (2) relates only to *listed* terrorist organisations. It makes it an offence to intentionally provide training to, or receive training from, a listed terrorist organisation.

⁶⁰ See further Nicola McGarrity, 'Review of the Proscription of Terrorist Organisations: What Role for Procedural Fairness?' (2008) 16 *Australian Journal of Administrative Law* 45.

⁶¹ Federation of Community Legal Centres (Vic) Inc, Submission No 7, PJCIS, Parliament of Australia, Review of the relisting of the Kurdistan Workers Party (PKK) as a terrorist organisation under the *Criminal Code Act 1995*, May 2008, 4.

⁶² *Ibid.*

The Sheller Committee noted that each of these offences ‘catches quite innocent training or teaching of persons who may, unknown to the teacher, be members of a terrorist organisation’.⁶³ That is, they are not sufficiently targeted to the culpable conduct, namely, the provision to a terrorist organisation of support that is connected with engagement in or preparation for a terrorist act. The offences would capture, for example, the provision of training in the use of office equipment to a terrorist organisation or the delivery of humanitarian aid during times of conflict.⁶⁴ We therefore recommend a redrafting of s 102.5, making it an element of each offence ‘either that the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act’.⁶⁵

The offence in subsection (2) is particularly problematic because it is a strict liability offence. The fact that the relevant organisation has been listed by regulation negates any requirement for the prosecution to establish intention, knowledge or recklessness on the defendant’s part as to the fact that the organisation is a terrorist organisation. Confusingly, subsection 102.5(4) provides that the offence only applies if the defendant is reckless as to whether the organisation was a terrorist organisation. As with the offences in ss 101.4 and 101.5 (discussed above), an evidential burden falls upon the defendant in relation to this matter. The defendant is required to point to evidence that he or she was not reckless – in other words, he or she was not aware of a substantial risk that the organisation was a terrorist organisation – before the prosecution is required to prove this state of mind. In effect, the defendant is presumed to have a criminal state of mind. In June 2006, the Sheller Committee concluded that there was no reason for subsection 102.5(2) to be a strict liability provision (especially given that the other offences in Division 102 contain a requirement of knowledge and/or recklessness).⁶⁶ We agree with this conclusion. Given that the offence in subsection 102.5(1) adopts a recklessness fault element, we would therefore propose simply that the offence in subsection 102.5(2) be deleted.

Recommendation 15

- (a) *Subsection 102.5(1) of the Criminal Code should be amended to make it an element of the offence ‘either that the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act’.*
- (b) *Subsection 102.5(2) should be repealed.*

B Funding a Terrorist Organisation (Criminal Code s 102.6)

There are four terrorism funding offences in the *Criminal Code* (as well as another two in the *Charter of the United Nations Act 1945* (Cth)). Two of these offences are contained in s 102.6. In essence, these offences criminalise the act of ‘[g]etting funds to, from or for a terrorist organisation’. The focus of the s 102.6 offences is to stem the flow of financial and human resources to terrorist organisations so that those organisations will no longer be able to function. However, this is an overly-simplistic view; not all of the activities of organisations regarded as terrorist organisations are related to the commission of terrorist activities. For example, when the Liberation Tigers of Tamil Eelam (*LTTE*) controlled the northern part of Sri Lanka, the

⁶³ Sheller Committee, *Report of the Security Legislation Review Committee* (2006) 117-118.

⁶⁴ *Ibid* Recommendation 12; PJCIS, Parliament of Australia, *Review of Security and Counter-Terrorism Legislation* (December 2006), Recommendation 16.

⁶⁵ Sheller Committee, *Report of the Security Legislation Review Committee* (2006), 117-118.

⁶⁶ *Ibid* 114.

only means of making humanitarian donations to people within this region was to funnel them through this organisation. The LTTE not only engaged in terrorist acts against the Sri Lankan government, but also operated a de facto government within this region. An offence which punishes the organisation or a person providing funding to that organisation regardless of the purpose to which the funds are to be put represents a disproportionate response to the threat of terrorism. Instead, the focus should be upon funds transfers that are related to preparing for, assisting with or the commission of a terrorist act (and not *any* financial involvement with a terrorist organisation).

Section 102.6(1) requires that the person know the organisation is a terrorist organisation. Section 102.6(2) does not; it is sufficient that the person is reckless as to whether the organisation is a terrorist organisation. This means that the person must simply be aware of a substantial risk that the organisation is a terrorist organisation and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk.⁶⁷ Section 102.6 attracts a lesser, but still very substantial, penalty of 15 years imprisonment. In our opinion, a knowledge or intention fault element is crucial to ensuring that the funding offences do not capture conduct that is unworthy of criminalisation. Further, the s 102.6 offences were enacted in response to United Nations Security Council Resolution 1373, which clearly incorporates a knowledge or intention fault element. The final advance of an intention or knowledge fault element is that it would reduce uncertainty about the scope of a person's legal liability. At present, a person must conduct rigorous investigations as to the background of the organisation to which they are providing funds and the purposes to which those funds may be put. This places a very heavy burden – in terms of time, money and resources – upon the person wishing to provide funds. We therefore recommend that s 102.6(2) be repealed.

Concerns about the breadth of the s 102.6 offences might be mitigated if certain categories of conduct were exempt (or, at the very least, a defence existed for these categories). However, at present there is only one, narrow category of exempt conduct. This category is only available to a lawyer and only if he or she received funds from a terrorist organisation solely for the purpose of legal representation for a person in proceedings relating to Division 102 of the *Criminal Code* or assisting the organisation to comply with a law of the Commonwealth, a State or a Territory.⁶⁸ It may be difficult in practice for a defendant to rely on this exemption. This is because he or she bears the legal burden of proving that the legal representation or assistance was for one of the aforementioned purposes, and proof of this may involve breaching client-lawyer privilege. A far better approach would be to extend the categories of excepted conduct to the 'provision of legal representation or assistance' generally. This amendment was supported by the PJCIS in 2006.⁶⁹

Recommendation 16

- (a) *Subsection 102.6(2) of the Criminal Code should be repealed.*
- (b) *The defence in subsection 102.6(3) should be expanded to the 'provision of legal representation or assistance' generally.*

C *Associating with a Terrorist Organisation (Criminal Code s 102.8)*

Under section 102.8, it is an offence punishable by up to three years' imprisonment to knowingly associate, on two or more occasions, with a member of a listed terrorist organisation

⁶⁷ *Criminal Code* s 5.4.

⁶⁸ *Criminal Code* s 106.2(3).

⁶⁹ PJCIS, Parliament of Australia, *Review of Security and Counter-Terrorism Legislation* (December 2006) [5.85].

or a person who directs or promotes the activities of such an organisation. To commit the offence, the association must provide support to the terrorist organisation that is intended to ‘assist the organisation to expand or continue to exist’. The Sheller Committee and the PJCIS have both recommended that this provision be repealed.⁷⁰ We support this recommendation for three reasons.

First, the association offence significantly interferes with fundamental human rights – the freedoms of speech and association – in a manner that is disproportionate to the protection of the community from the threat of terrorism.⁷¹ The offence is disproportionate because it does not properly target the culpable conduct. It is the provision of material support to the terrorist organisation that should be criminalised rather than the mere fact of a person’s association with a member of the organisation.⁷² Such conduct is already criminalised by s 102.7, which makes it an offence to provide support or resources to a terrorist organisation where it would help the organisation to engage in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs).

Second, status offences such as the membership and association offences undermine traditional criminal justice principles. In particular, the principle of *nulla poena sine lege* – that the criminal law should punish people for their activities rather than because of who or what they are. Whilst status offences are not without precedent in the criminal law, for example, vagrancy, prostitution and drunkenness, they are generally summary offences and do not carry penalties as hefty as that attaching to the association offence (3 years imprisonment).

Finally, this offence has been identified as a major contributor to the unhelpful perception amongst Australian Muslim communities that they are being targeted in a discriminatory manner by the counter-terrorism laws.⁷³ This is one of the greatest challenges facing the Commonwealth in achieving an effective counter-terrorism strategy. Terrorism is far more likely to emerge from a divided society in which some feel marginalised and disempowered on the basis of their race or religious beliefs. Any factors that may isolate and exclude Muslim communities must be seriously addressed, especially when their value to national security appears negligible.

In the event that the association offence is not repealed (as we have suggested would be appropriate), it is necessary for a number of amendments to be made to the drafting of the offence. First, the recklessness fault element should be replaced with an intention or knowledge fault element. Second, the ‘constitutional defence’ should be amended. It is unjust to place an evidential burden on the defendant to establish that the operation of the section would infringe the constitutional freedom of political communication. Instead, the limits of the offence should be clearly stated in the section. With a more clearly expressed (and limited) offence, law

⁷⁰ Australian Government, Attorney-General’s Department, *Australian Government Response to ALRC Review of Sedition Laws in Australia* (December 2008) 13 (Recommendation 15); Parliament of the Commonwealth of Australia, PJCIS, Parliament of Australia, *Review of Security and Counter-terrorism Legislation* (December 2006) 81 (Recommendation 19).

⁷¹ Sheller Committee, *Report of the Security Legislation Review Committee* (2006) 3-4; Australian Government, Attorney-General’s Department, *Australian Government Response to ALRC Review of Sedition Laws in Australia* (December 2008) 4-5.

⁷² Australian Government, Attorney-General’s Department, *Australian Government Response to ALRC Review of Sedition Laws in Australia* (December 2008) 129; PJCIS, Parliament of Australia, *Review of Security and Counter-Terrorism Legislation* (December 2006) 80.

⁷³ Australian Government, Attorney-General’s Department, *Australian Government Response to ALRC Review of Sedition Laws in Australia* (December 2008) 14.

enforcement agencies and members of the community would more easily be able to determine when an offence is being committed.

Recommendation 17

Section 102.8 of the Criminal Code should be repealed.

VI FUNDING OFFENCES (*CRIMINAL CODE DIV 103*)

Section 103.1 criminalises the collection or provision of funds where the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act. Another offence, in s 103.2, criminalises the making of funds available to or the collection of funds or, or on behalf of, another person. The fault element of recklessness also applies to this offence. These offences may be committed notwithstanding a terrorist act does not occur or that the funds will not actually be used to facilitate or engage in a specific terrorist act.

As the Law Council of Australia has commented, the adoption of a recklessness standard ‘casts the net of criminal liability too wide’.⁷⁴ It makes it impossible for any person to know the scope of their legal liabilities with any certainty. Terrorists obtain financing from a range of sources, including legitimate institutions (such as money laundering through banks), and employ a variety of deceptive means to secure funding. This offence would require every Australian to vigilantly consider where their money might end up before donating to a charity, investing in stocks, depositing money with a bank, or even giving money as a birthday present. Therefore, the fault element should be amended, to require intention or knowledge that the funds would be used to facilitate or engage in a terrorist act.

The penalty for both offences is life imprisonment. This is disproportionate to the gravity of the conduct involved. One of the authors has recommended that the penalty be reduced, to align with those imposed for the vast majority of the preparatory offences in Division 101 of the *Criminal Code*; that is ‘15 years imprisonment (at the very most)’ if the fault element remains as is, or 25 years if the fault element is replaced with that of knowledge or intent.⁷⁵

A further question is whether both offences are necessary. In our opinion, there is considerable overlap between the offences. This has the negative effect of diminishing the clarity and accessibility of the law. Section 103.1 was introduced by the *Suppression of the Financing of Terrorism Act 2002* (Cth) to implement Security Council Resolution 1373.⁷⁶ However, in 2005, the Financial Action Task-Force (‘FATF’) found that s 103.1 was inadequate.⁷⁷ Section 103.2 was introduced to respond to this.⁷⁸ In our opinion, however, the FATF ‘got it wrong’. The only real difference between the offences is that s 103.2 requires funds to be made available to or collected for, or on behalf of, *another person*. That is, the first-mentioned person must have a particular person in mind when collecting the funds. If anything, this suggests section 103.2 is narrower than section 103.1. The strong likelihood is that the s 103.1 offence would have covered the situation where funds were provided to, made available to or collected for, or on

⁷⁴ Law Council of Australia, *Anti-Terrorism Reform Project* (2008) 30.

⁷⁵ Nicola McGarrity, ‘The Criminalisation of Terrorist Financing in Australia’ (2012) 38(3) *Monash Law Review* (forthcoming).

⁷⁶ Explanatory Memorandum to the *Suppression of the Financing of Terrorism Act 2002* (Cth).

⁷⁷ Financial Action Taskforce, *Third Mutual Evaluation Report on Money Laundering and Combating of the Financing of Terrorism – Australia* (14 October 2005) 32-33.

⁷⁸ Explanatory Memorandum to the Anti-Terrorism Bill (No. 2) 2005 (Cth) 13.

behalf of, an ‘individual terrorist’.⁷⁹ Our recommendation therefore is that s 103.2 should be repealed.

Recommendation 18

- (a) *The offence in s 103.1 of the Criminal Code should be amended to require intention or knowledge that the funds would be used to facilitate or engage in a terrorist act.*
- (b) *The maximum penalty for the offence in s 103.1 should be reduced to 15 years (if the fault element is recklessness) or 25 years (if the fault element is intention or knowledge).*
- (c) *Section 103.2 of the Criminal Code should be repealed.*

VII CONTROL ORDERS (*CRIMINAL CODE DIV 104*)

Under Division 104 of the *Criminal Code*, a control order may be issued by an ‘issuing court’ (the Federal Court, Family Court or the Federal Magistrates Court) if it is satisfied, on the balance of probabilities that ‘making the order would substantially assist in preventing a terrorist act’ or ‘the person subject to the order has provided training to, or receiving training from, a listed terrorist organisation’.⁸⁰ A control order may impose a variety of obligations, prohibitions and restrictions on a person, for example, being at specified areas or places, restricting communication with certain people or wearing a tracking device, for up to one year.⁸¹ The court must be satisfied that each of these obligations, prohibitions or restrictions is ‘reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act’.⁸²

Control orders were modelled on the measure of the same name enacted in the United Kingdom (the first and only other comparable country to have created such a measure). The United Kingdom introduced its regime in March 2005 as a legislative response to the decision of the House of Lords in *A v Secretary of State for the Home Department*.⁸³ The effect of this decision was that the United Kingdom could not keep foreign nationals in indefinite immigration or preventative detention (nor, where a person faced a real risk of torture, could they deport them to their home country). Indefinite detention would breach either Article 3 (the prohibition against torture and inhumane or degrading treatment) or, in the absence of a valid derogation, Article 5 (the right to liberty) of the European Convention on Human Rights (‘ECHR’).⁸⁴ There were also significant obstacles to the United Kingdom using the criminal justice system to prosecute individuals whom it believed posed a security risk. First, intercept evidence is inadmissible in criminal proceedings in the United Kingdom.⁸⁵ Second, when control orders were introduced, the United Kingdom did not yet have preparatory terrorism offences as broad as those which have existed in Australia since 2002. The United Kingdom therefore developed the control order system as an alternative means of incapacitating suspect individuals.

⁷⁹ This is consistent with the approach across the range of Australia’s terrorism offences.

⁸⁰ *Criminal Code* s 104.4.

⁸¹ *Criminal Code* s 104.5.

⁸² *Criminal Code* s 104.4.

⁸³ [2004] UKHL 56.

⁸⁴ *Chahal v United Kingdom* [1996] ECHR 54; *A v Secretary of State for the Home Department* [2004] UKHL 56. In *A v Secretary of State*, the United Kingdom House of Lords considered the validity of a derogation which had been entered to excuse the preventative detention of those individuals the United Kingdom could not deport on national security grounds. The preventative detention measure applied only to non-citizens. However, the evidence showed that the security risk posed by citizens was just as great (see eg [32]). Therefore, the House of Lords concluded that the measures were not adequately tailored to counter the terrorist threat and not ‘strictly required by the exigencies of the situation’.

⁸⁵ *Police Act 1997* (UK) Pt 1.

In Australia, these legal obstacles simply do not exist. As mentioned above, the *Criminal Code* establishes a broad range of preparatory terrorism offences, including section 101.6, which criminalises ‘any act (done) in preparation or planning a terrorist act’. Inchoate liability also attaches to these preparatory offences. For example, it is an offence to attempt to do an act in preparation for a terrorist act.⁸⁶ Intercept evidence is admissible in criminal proceedings,⁸⁷ and there is no Australian equivalent to the ECHR which would prevent the Australian government from either deporting non-citizens thought to pose a security risk, nor detaining them indefinitely. In fact, the High Court upheld the constitutional validity of indefinite detention of non-citizens in *Al-Kateb v Godwin*.⁸⁸ The constitutional validity of preventative detention in certain non-immigration contexts has also been upheld.⁸⁹

United Kingdom control orders ‘were widely condemned on human rights grounds and ... subject to many successful court challenges’.⁹⁰ In 2011, a comprehensive review by the United Kingdom government concluded that control orders were too intrusive and untargeted.⁹¹ At first glance, this suggests Australia should repeal its regime too. However, the comparison is not so clear cut. The United Kingdom abolished control orders, but replaced them with something similar: Terrorism Prevention and Investigation Measures (‘TPIMs’).⁹² This was again justified on a basis that does not exist in Australia: although broad preparatory offences were introduced into the United Kingdom in 2006, the ban on intercept evidence remains in place and the deportation restrictions under the ECHR are an immutable constraint. Further, although the Australian regime was inspired by the United Kingdom regime, the two regimes were always quite different in operation.⁹³ For example, United Kingdom control orders were executive orders subject to judicial review, rather than judicial orders. The grounds upon which a United Kingdom control order could be made were narrower than those which apply to the Australian regime, requiring proof of individual involvement in terrorism related activity.

Clearly, far from sustaining the Australian control order regime, the United Kingdom precedent actually serves to undermine it. Australia does not face the same obstacles which necessitated the creation of control orders in the United Kingdom or their replacement by the TPIM regime. The United Kingdom has found that control orders are not ‘best practice’; rather, they are unnecessarily invasive. If Australia adopted control orders to follow the example of a country which has since found them to be unsatisfactory, is there some other reason that might be given for their retention? The former Attorney-General Phillip Ruddock MP justified control orders on the basis that they are more cost-effective than surveillance.⁹⁴ Similar statements have recently been made in the United Kingdom.⁹⁵ This is a remarkably poor justification for extraordinary powers which permit such significant restrictions on individual liberties. Thus,

⁸⁶ *Criminal Code* ss 11.1 and 101.6.

⁸⁷ *Telecommunications (Interception and Access) Act 1979* (Cth), Pts 2-6.

⁸⁸ (2004) 219 CLR 562.

⁸⁹ *Thomas v Mowbray* (2007) 233 CLR 307, 328, adopting statement of McHugh J in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575. Note other judges have expressed different views – see for example Gummow J in *Fardon*, 612.

⁹⁰ Clive Walker and Alexander Horne, ‘The Terrorism Prevention and Investigation Measures Act 2011: One Thing but Not Much the Other?’ (2012) *Criminal Law Review* 421, 422-423.

⁹¹ United Kingdom Government, *Review of Counter-Terrorism and Security Powers* (2011).

⁹² *Terrorism Prevention and Investigation Measures Act 2011* (UK).

⁹³ See further Andrew Lynch, ‘Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law’ (2008) 8 *Commonwealth Law Journal* 159.

⁹⁴ Andrew Lynch, Ben Saul and George Williams, Submission No 80, Senate Legal and Constitutional Affairs Committee, Inquiry into the Provisions of the Anti-Terrorism Bill [No 2] 2005 (Cth), 10 November 2005, 10.

⁹⁵ United Kingdom Government, *Review of Counter-Terrorism and Security Powers* (2011) 38.

international comparisons strongly suggest the Australian regime is unjustified and should be repealed.

The evidence to date also suggests that control orders are unnecessary to respond to the threat of terrorism. Only two interim control orders have ever been made, and only one of those was confirmed. The first was made against Joseph Thomas immediately after his successful appeal against conviction for a number of terrorism offences, using the very evidence from his trial which had been ruled inadmissible on appeal.⁹⁶ The second was also unusual. After over five years detention in Guantanamo Bay, David Hicks was convicted after pleading guilty to a crime in proceedings before a United States military commission. Having served out the remainder of his sentence in a South Australian gaol, David Hicks was placed under a control order which he did not seek to challenge.⁹⁷ One cannot help but suspect that the making of a control order against Hicks was driven by political, not legal or investigative, concerns. It is instructive that in both cases the control orders were applied as a postscript to some other legal proceeding – this is quite distinct from their justification in the United Kingdom and Australia at the time of their introduction as a measure to be used when there was an insufficiency of evidence or some other obstacle to the bringing of criminal charges.

No control order has been made since the control order over David Hicks was confirmed in 2008 (it was not extended upon elapsing). Yet, Australia's terrorism alert level has remained at medium and the Director-General of ASIO has recently stated: 'each year ASIO responds to literally thousands of counterterrorism leads ... we are currently involved in several hundred counterterrorism investigations and inquiries.'⁹⁸ The fact control orders remain unused in such a climate suggests they are not a useful or necessary tool. In comparison, 52 control orders were made in the United Kingdom over a comparable length of time. This appears to support our claim that the need for such orders which may have existed in the United Kingdom does not exist in Australia.

Based on the limited Australian experience, the only role which control orders can play in Australia is a dangerous one; permitting the AFP to 'forum shop' and impose restrictions on individuals who may have been acquitted of any criminal charges, or to engage in political posturing.⁹⁹ If the only role that control orders are likely to play is to subvert the integrity of the anti-terrorism law system, they should be repealed.

Recommendation 19

Division 104 of the Criminal Code should be repealed.

VIII PREVENTATIVE DETENTION ORDERS

A Commonwealth Preventative Detention Regime (Criminal Code Div 105)

⁹⁶ *Jabbour v Thomas* [2006] FMCA 1286.

⁹⁷ *Jabbour v Hicks* (2007) FCMA 2139; *Jabbour v Hicks* [2008] FMCA 178. Federal Magistrate Warren Donald was reported as lamenting the fact that the order was issued on the basis of evidence from only one-side: ABC Radio, 'Hicks fails to appear at control order hearing', *PM*, 18 February 2008 (Warren Donald FM).

⁹⁸ Senate Legal and Constitutional Affairs Legislation Committee, Senate, Estimates Hearing, 25 May 2011, 100 (David Irvine).

⁹⁹ Lucia Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007) 257, 265; Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's Criminal Code Since September 11, 2001' (2007) 16(1) *Griffith Law Review* 27, 50.

There are two types of preventative detention order that may be obtained under Division 105 of the *Criminal Code*. Under subsection 105.4(4), a preventative detention order may be made if:

- (a) there are reasonable grounds to suspect that the subject:
 - (i) will engage in a terrorist act; or
 - (ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
 - (iii) has done, or will do, an act in preparation for, or planning, a terrorist act; and
- (b) making the order would substantially assist in preventing a terrorist act occurring; and
- (c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purposes referred to in paragraph (b).

Under subsection 105.4(6), a preventative detention order may be made where it is necessary to detain a person in order to preserve evidence relating to a terrorist act that has occurred within the last 28 days. These two types of preventative detention order clearly have distinct purposes – prevention and preservation respectively. Neither has been applied in respect of a single individual since the Division was enacted in late 2005. Both are significantly problematic.

Turning to the first variety of order (that which is purely preventative in nature), if the requirements of paragraph 105.4(4)(a) can be satisfied, then as the law already stands there must be a high possibility that the subject could be charged with and prosecuted for a number of existing offences under Division 101 of the *Criminal Code*, which would certainly avoid the intended terrorist act taking place (as contemplated by paragraph 105.4(4)(b)). A suspect could be held in custody pending trial, and could be subject to the presumption against bail for terrorism offences.¹⁰⁰ The broad definition of ‘terrorism’ and the range of preparatory and inchoate terrorism offences (as discussed above) make it difficult to imagine a terrorist related activity which would enliven the power to make a preventative detention order but would not constitute a crime.

The purpose behind a preventative detention order under subsection 105.4(4) might perhaps be to cover those circumstances where the authorities are not in possession of sufficient evidence to support laying a charge but dare not allow the suspect his or her liberty any longer – either in order for the individual to further incriminate him or herself or, conversely, to dispel the suspicion about them. The extensive use in Australia of criminal offences, and the total non-use of preventative detention orders, suggests such circumstances arise rarely in practice. The fact that intercept evidence can be used as evidence in criminal proceedings must account in part for this, though it is worth noting that even in a jurisdiction such as the United Kingdom where intercept evidence is inadmissible, there is no equivalent of the preventative detention order. Another possible explanation for this variety of preventative detention order might be that it enables authorities to protect intelligence sources and not reveal security sensitive evidence in court. Yet, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) was enacted precisely to protect such evidence, whilst ensuring the rights of suspects. Again, the experience of applying that legislation to criminal trials for terrorism offences suggests this justification is weak.

Additionally, the *Australian Security Intelligence Organisation Act 1979* (Cth) empowers ASIO, where an investigation may otherwise be hampered, to seek a warrant for the detention for seven days of *any* persons who may have information about a terrorism offence (including its planning). So if there is not enough evidence to charge a person for offences in Division 101 of the *Criminal Code*, then they could still be detained and questioned about what they know of

¹⁰⁰ See for example s 8A of the *Bail Act 1978* (NSW).

any planned attack. That surely fulfils the purpose of prevention – far more so than the proposed Division 105 under which the Australian Federal Police are *prohibited* from questioning the person detained.¹⁰¹ Indeed, s 105.26 of the *Criminal Code* provides for the overriding of a preventative detention order by an ASIO warrant in respect of the subject. This demonstrates the very different purposes behind detention under Division 105 and its supposed inspiration, the *Terrorism Act 2000* (UK). The latter is designed to enable police to hold an individual for questioning and investigation – very similar to the power which ASIO already enjoys here. The United Kingdom scheme is thus in aid of the criminal process in a way that an order made under Division 105 is clearly not.

The purpose of the second type of preventative detention order, that which aims to preserve evidence after an attack has occurred, is slightly easier to appreciate. Although it arguably aims to assist criminal prosecutions, detention of individuals, without any requirement of wrongdoing on their behalf, is an extraordinary measure. It may potentially allow detention of large groups of people from ‘suspect communities’ based upon crude racial profiling in the wake of a terrorist incident. This occurred in the United States after September 11, with many people held under ‘material witness’ provisions. This is a highly undesirable way in which to conduct efficient police investigations that respect the rights of innocent people.

In light of the broad powers already existing, which enable charging or questioning of persons before any terrorist act has occurred, and the extreme impact of detention as a means of preserving evidence, we submit that Division 105, which has proven of no value to date, is unnecessary and should be repealed. But we note that with the agreement of the States and Territories to pass laws for the extended detention of persons initially dealt with under Division 105, this aspect of Australia’s anti-terrorism law is well-entrenched. We turn now to consider the State and Territory schemes.

B *State and Territory Preventative Detention Regimes*

Following the enactment of the Commonwealth preventative detention regimes, every Australian State and Territory enacted ‘corresponding’ legislation, enabling for detention of individuals for up to a total of 14 days (inclusive of any period of detention already ordered in respect of a particular terrorist act).¹⁰² The grounds for the making of a preventative detention order and many aspects of their operation (including that prevention detention orders may not be issued in respect of children under 16 years of age, but for the ACT Act which only applies to adults,¹⁰³ and the detainee may not be questioned whilst held under an order) are identical under the State schemes to the provisions of Division 105.¹⁰⁴ The detainee has a right to contact a lawyer (although their choice of lawyer may be restricted by a prohibited contact order),¹⁰⁵ lodge a complaint or to seek remedy from a court relating to the order or their treatment under a preventative detention order.¹⁰⁶ The following sections address the process by which

¹⁰¹ *Criminal Code* s 105.42.

¹⁰² *Terrorism (Police Powers) Act 2002* (NSW); *Terrorism (Preventative Detention) Act 2005* (Qld); *Terrorism (Preventative Detention) Act 2005* (SA); *Terrorism (Preventative Detention) Act 2005* (Tas); *Terrorism (Community Protection) Act 2003* (Vic); *Terrorism (Preventative Detention) Act 2006* (WA); *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT); *Terrorism (Emergency Powers) Act 2003* (NT).

¹⁰³ (ACT) s 11.

¹⁰⁴ The grounds for issue may be found in: (SA) s 6; (WA) s 9; (Qld) s 8; (NSW) 26D; (Tas) s 7; (ACT) s 18. The restriction on questioning may be found in (WA) s 47; (Qld) s 53; (NSW) s 26ZK; (Tas) s 39.

¹⁰⁵ (SA) s 37; (WA) s 43; (Qld) s 58; (Tas) s 34;

¹⁰⁶ (SA) s 29(2); (WA) s 57; (Qld) ss 47(3) and 48(2); (Tas) s 26(3).

preventative detention orders are made in the respective states, and the constitutional problems which may arise.

1 *Queensland, South Australia, Western Australia and the Northern Territory*

The Queensland, South Australian, Western Australian and Northern Territory legislation provides for the issuing of preventative detention orders by a similar process to that in Division 105 of the *Criminal Code*. ‘Urgent’ or ‘interim’ orders allowing for up to 24 hours detention may be issued by Senior Police Officers.¹⁰⁷ Preventative detention orders enabling up to 14 days detention¹⁰⁸ must be issued by judges and, but for South Australia, retired judges appointed consensually to the role of issuing authority.¹⁰⁹ Under the Queensland legislation, the detainee also has the right to make submissions to the issuing authority in respect of a final preventative detention order,¹¹⁰ and the Public Interest Monitor is to be informed at all stages of the process.

Whilst preventative detention orders in these States are issued by judges in a non-judicial capacity, the South Australian and Western Australian Acts provide for the review of the preventative detention order by the Supreme Court as soon as practicable after the person is taken into custody.¹¹¹ The Queensland Act also provides for review by the Supreme Court, but only on initiation by the detainee¹¹² or, on a mandatory basis, by the Commissioner once the detention has reached a period of 7 days and the detainee has failed to apply for review.¹¹³ On review the Supreme Court may hear submissions from the detainee¹¹⁴ as well as the Police, and may quash the order, remit the order to an issuing authority with directions to lessen or limit the period of detention, declare the preventative detention order void, award compensation if warranted or make directions about further preventative detention orders.¹¹⁵

2 *New South Wales, Tasmania, Victoria and the Australian Capital Territory*

In Tasmania and Victoria urgent orders of up to 24 hours detention may be issued by Senior Police Officers.¹¹⁶ In NSW and the ACT, interim orders of up to 48 hours may be issued by the Supreme Court in ex parte proceedings of which no notice is given to the potential detainee.¹¹⁷ Preventative Detention Orders of up to 14 days may only be issued by the Supreme Court of Tasmania, Victoria, NSW and the ACT following a hearing. At the Supreme Court hearing evidence may be called and submissions made by both parties. The usual powers and discretions of the Court are maintained, subject to the provisions of the legislation, which include: compromises to the rules of evidence to allow any evidence that the court considers

¹⁰⁷ (Qld) ss 7(1) and 12(1).

¹⁰⁸ (WA) s 13(3); (Qld) s 12(2) that is, 14 days inclusive of any period of detention issued on the same basis (in respect of the same terrorist act) under any corresponding State or Commonwealth preventative detention order law.

¹⁰⁹ (SA) s 4; (WA) s 7; (Qld) s 7. The Queensland legislation expressly states the role of issuing authority is conferred on the judge or magistrate in his or her personal capacity: s 77.

¹¹⁰ (Qld) s 23

¹¹¹ (SA) s 17; (WA) s 22.

¹¹² (Qld) s 71.

¹¹³ (Qld) s 72.

¹¹⁴ (SA) s 29(2)(b).

¹¹⁵ (SA) s 17; (WA) s 22 (8) and 57(3); (Qld) Part 6.

¹¹⁶ (Tas) s 5.

¹¹⁷ (NSW) ss 26H, 26 L; (ACT) ss20, 22. In the ACT, an interim preventive detention order may be initially made for a period of 24 hours and extended for a further 24 hours.

credible and trustworthy.¹¹⁸ The Tasmanian Act specifies that the Supreme Court Proceedings are civil in nature, but that despite this the civil rules of practice and procedure do not apply to them.¹¹⁹

In 2007, we commended the NSW Parliament on including additional safeguards in the NSW preventative detention model that are not included in the Commonwealth model.¹²⁰ These include the role of the Supreme Court in confirming orders, the entitlement of detainees to give evidence before a hearing of the court and the right of detainees to apply to have an order revoked. These safeguards would be appropriate in any preventative detention scheme but are all the more necessary in the NSW scheme, given that it provides for a longer period of detention and greater deprivation of liberty than the Commonwealth scheme.

The involvement of courts in the process of issuing continued preventative detention orders in these jurisdictions presumably reflects a concern that the deprivation of liberty should only occur as a result of a fair and proper process in which the detainee has an opportunity to effectively challenge the basis for his or her detention. This presents a preferable mechanism for issuing preventative detention orders over that adopted in other States and in the Commonwealth context. If the Commonwealth scheme is retained, it ought to be brought into line with the schemes that provide for the issue of preventative detention orders by a court or, at the very least, review of the order by a court. We accept that federal court issuance of preventative detention orders may risk a potential constitutional challenge stemming from the strict separation of powers under Chapter III of the Constitution. However, the High Court decision in *Thomas v Mowbray*¹²¹ provides some guidance (albeit in the control order context) on the validity of judicial involvement in making orders for the purpose of protecting the community from terrorism. The High Court case of *Fardon* also indicates the procedural requirements and protections that are necessary to enable federal courts to order preventative detention. We note that the introduction of the additional safeguard provided by judicial issuance and review of preventative detention orders would not justify the extension of the potential duration of the Commonwealth orders. The existing time-limit is no more than is proportionate to the purpose of the orders.

Recommendation 20

- (a) *Division 105 of the Criminal Code and the State and Territory preventative detention regimes should be repealed.*
- (b) *In the alternative, any preventative detention regimes should be modelled upon the NSW regime (which includes additional safeguards).*

IX REVIEW OF CONTROL ORDERS AND PREVENTATIVE DETENTION ORDERS

None of the decisions made under Division 104 (apart from section 104.2)¹²² are expressly excluded from the scope of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*'). However, the *ADJR Act* only applies to decisions of an 'administrative character'.¹²³ The decisions made by a judicial body, such as the issuing court in making a

¹¹⁸ (NSW) s 26O.

¹¹⁹ (Tas) s 44.

¹²⁰ Andrew Lynch, Edwina MacDonald and George Williams, Submission, NSW Ombudsman, Review of Parts 2A and 3 of the Terrorism (Police Powers) Act 2002 (NSW), 13 June 2007, 3.

¹²¹ (2007) 233 CLR 307.

¹²² *ADJR Act* Schedule 1.

¹²³ *ADJR Act* s 3(1).

control order, are not decisions of an ‘administrative character,’¹²⁴ and therefore would not be covered by the *ADJR Act*.

In contrast, decisions made under Division 105 are expressly excluded from the scope of the *ADJR Act*.¹²⁵ The *Criminal Code* also purports to deny the jurisdiction of State and Supreme Courts to review decisions made under Division 105 while a preventative detention order is in force.¹²⁶ However, in light of the recent decision in *Kirk v Industrial Relations Commission*,¹²⁷ State Supreme Courts may still be able to review decisions alleged to be vitiated by a jurisdictional error.

We are not particularly concerned about this situation. Decisions under both Division 104 and Division 105 may both still be reviewed in the High Court (pursuant to its original jurisdiction under s 75(v)) and in the Federal Court (under s 39B of the *Judiciary Act 1903* (Cth)). Therefore, the effect of excluding Divisions 104 and 105 from the *ADJR Act*, and the possible exclusion of Division 105 decisions from the State Supreme Courts, is simply to limit those courts to which a challenge may be brought. As discussed above with respect to the Commonwealth preventative detention order regime, we nonetheless recommend that (if it is retained) it is brought into line with the NSW scheme, including by the provision that orders are confirmed by a court. Not only would this provide an additional safeguard and appropriate means of oversight and accountability, but it would directly engage the courts in an otherwise administrative process.

In our opinion, the lack of information to which a person is entitled under the control order and preventative detention order regimes is of far greater concern. For example, a person subject to an interim control order is only entitled to a summary of the grounds upon which the order has been made. This summary need not include security sensitive information (even if that information forms the core of the case against the person). This has a significant impact on the person’s ability to meaningfully challenge the control order at a confirmation hearing. Our primary recommendation above is that the control order regime should be repealed. However, if it is retained, the *Criminal Code* should be amended to remove the apparent tension within existing provisions over the minimum level of disclosure to which a controlee is entitled. In particular, an express provision should be added to the effect that the person must be given sufficient information (including security sensitive information) to understand and respond to the case for confirmation of the control order. If the person is not informed of the ‘core’ or ‘gist’ of the case, the control order may not be confirmed. This amendment would bring the Australian control order scheme more clearly into line with the changes wrought to its United Kingdom antecedent through decisions of the European Court of Human Rights and the United Kingdom Supreme Court.¹²⁸ It is a separate policy question whether an obligation to meet this level of disclosure renders the control order regime unworkable; if so, the regime should be repealed.

Recommendation 21

¹²⁴ In *Thomas v Mowbray* (2007) 233 CLR 307, a majority of the High Court concluded that the power to make interim control orders was judicial and not otherwise contrary to the separation of judicial power. This finding has been analysed, and criticised, at length elsewhere. See for example Andrew Lynch, ‘Thomas v Mowbray: Australia’s “War on Terror” Reaches the High Court’ (2008) 32 *Melbourne University Law Review* 1183.

¹²⁵ *ADJR Act* Schedule 1.

¹²⁶ *Criminal Code* s 105.51(2).

¹²⁷ (2010) 239 CLR 531.

¹²⁸ *A v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 3455/05, 19 February 2009) and *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28.

If the control order regime in Division 104 of the Criminal Code is retained, an express provision should be added to the effect that the person must be given sufficient information (including security sensitive information) to understand and respond to the case for confirmation of the control order. A similar provision should also be included in Division 105 of the Criminal Code.

X SEARCH AND SEIZURE (CRIMES ACT PT IAA DIV 3A)

Part IAA Division 3A of the *Crimes Act 1914* (Cth) ('*Crimes Act*') was introduced by the *Anti-Terrorism Act (No 2) 2005* (Cth), and was said to provide 'a new regime of stop, question, search and seize powers that will be exercisable at airports and other Commonwealth places to prevent or respond to terrorism'.¹²⁹ This Division obligates a person to answer certain police questions (for example, the person's reason for being in a particular Commonwealth places). It also empowers police officers in certain situations to conduct a warrantless search of the person, premises, vehicle or thing. In particular, where the person is in a Commonwealth place or a 'prescribed security zone' and a police officer suspects that the person might have committed, be committing or about to commit a terrorist act. We echo the Law Council's concerns about the breadth of these provisions and the excessive discretion (without judicial oversight) that they vest in the executive branch of government.¹³⁰

A Warrantless Searches (Crimes Act s 3UEA)

The *National Security Legislation Amendment Act 2010* (Cth) expanded the scope of police powers under Division 3A. In particular, it introduced s 3UEA. This section allows a member of the AFP to enter premises without a warrant where he or she reasonably suspects that: it is necessary to exercise this power in order to prevent a thing that is on the premises from being used in connection with a terrorism offence; and it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety. We opposed the introduction of these powers.¹³¹

The purpose of entry is to search the premises and seize the particular thing. If the member of the AFP finds any other thing relevant to an indictable or summary offence, he or she must secure the premises and then obtain a search warrant. In relation to this, the former Commonwealth Attorney-General, Robert McClelland, stated:

The safeguard is that [the AFP] are not permitted, as a result of that entry without a warrant, to undertake law enforcement, evidence gathering tasks. They have to seal the premises and they have to go away to obtain a warrant. The whole thrust and intent is to enable police to render a premises safe and specifically to address some explosive device or material or another dangerous substance such as a dangerous chemical.¹³²

In our opinion, it is doubtful that such a clear line can be drawn between searches for the purpose of seizing a particular item and general searches undertaken as part of a criminal

¹²⁹ Explanatory Memorandum to the Anti-Terrorism Bill (No 2) 2005.

¹³⁰ Law Council of Australia, *Anti-Terrorism Reform Project* (2012) 78-81.

¹³¹ Ben Golder, Andrew Lynch, Nicola McGarrity, Christopher Michaelsen, Edward Santo, Ben Teeger and George Williams, Submission, Attorney-General's Department, National Security Legislation Discussion Paper, 24 September 2009, Part VII; Emily Collett, Andrew Lynch, Nicola McGarrity, Christopher Michaelsen, Edward Santow and George Williams, Submission, Senate Legal and Constitutional Affairs Committee, Inquiry into the National Security Legislation Amendment Bill 2010 (Cth), 30 April 2010, 33-34.

¹³² *7:30 Report*, Australian Broadcasting Corporation, 12 August 2009

<http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Transcripts_2009_ThirdQuarter_12August2009-Interview-ABC7.30ReportwithKerryOBrien> (18 September 2009).

investigation. Further, the Attorney-General's statement fails to appreciate the underlying rationale for search warrants. Searches of private property – regardless of their purpose – violate the rights to home and privacy. For this reason, and in order to limit the potential for misuse of power by the police during the course of a search, it is important that searches be overseen by a magistrate or judge. In each case, it should be for a magistrate or judge to weigh any evidence of a criminal offence and determine whether that evidence is sufficiently strong to justify a violation of the rights to home and privacy by the police.

A compelling justification should be demonstrated before the police are permitted to conduct searches of private property without judicial supervision. The most detailed (albeit still vague) explanation of the need for warrantless searches was set out by the Commonwealth Government in the National Security Legislation Discussion Paper. The Government stated that the power is 'intended to address *operational issues* that have emerged in law enforcement operations'.¹³³ In addition, '[t]he availability to the AFP of wider emergency powers has become *increasingly necessary* particularly in the area of counter-terrorism operations. An emergency entry power is necessary to supplement existing search, entry and seizure powers which only give police partial coverage for emergency situations'.¹³⁴ The former Commonwealth Attorney-General also stated that there will be some circumstances in which the police do not have the time to obtain a warrant from a magistrate or judge.¹³⁵ In our opinion, the AFP should only be given the power to conduct warrantless searches as a last resort. We note that the police are already able to obtain a search warrant by a variety of means (including phone and fax) at short notice. Another option that might be explored is the establishment of a duty judge system whereby applications for search warrants could be received and considered on an expedited basis. There is no evidence that such a system would be insufficient to respond to the concerns expressed by the Attorney-General.

Notably, the impetus for the power did not appear to have come from the AFP. The Chief Executive of the AFP Association, Jim Torr, has said that his members prefer the transparency and accountability that the warrant system provides, describing the removal of the requirement for a warrant as 'alien to 100 years of policing'.¹³⁶ It is incongruous that the proposal to give the AFP a power to conduct warrantless searches came only a couple of weeks after successful raids were conducted in Melbourne in early August 2009, and which resulted in the arrest and charging of five Somali-born men with terrorism offences. There was no suggestion during the course of the investigation into the activities of these men that the AFP was hampered by the requirement to obtain a search a warrant.

It is correct (as the Commonwealth Government notes in the 2009 National Security Discussion Paper)¹³⁷ that the States and Territories have legislation enabling their police to conduct warrantless searches in certain circumstances. However, this is not sufficient to justify the introduction of warrantless searches at the Commonwealth level for the AFP. Each expansion of police powers must be considered on its own merits. Furthermore, in our opinion, s 3UEA gives a broader discretion to the AFP than the State and Territory police forces have. For example, under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), the only

¹³³ Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 147.

¹³⁴ Attorney-General's Department, *National Security Legislation Discussion Paper* (August 2009) 151.

¹³⁵ *7:30 Report*, Australian Broadcasting Corporation, 12 August 2009

<http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Transcripts_2009_ThirdQuarter_12August2009-Interview-ABC7.30ReportwithKerryOBrien> (18 September 2009).

¹³⁶ Sally Neighbour, 'Haunted by Haneef', *The Australian*, 17 August 2009.

¹³⁷ Attorney-General's Department, *National Security Legislation Discussion Paper* (2009) 151.

circumstances in which the police are permitted to enter premises without a warrant are where they reasonably *believe* (not *suspect*, as proposed in the Discussion Paper) that:

- a breach of the peace is being or is likely to be committed and it is necessary to enter the premises immediately to end or prevent the breach of the peace, or
- a person has suffered significant physical injury or there is imminent danger of significant person and it is necessary to enter the premises immediately to prevent further significant physical injury or significant physical injury to a person.

In the absence of a compelling justification being demonstrated, we continue to oppose the power to conduct warrantless searches.

In the alternative, we would recommend, as we have previously,¹³⁸ that a number of safeguards be built into the legislation. First, that the member of the AFP who conducts the search is required to go before a magistrate or judge as soon as possible after the search has been conducted to obtain an ex post facto search warrant. Such a warrant would be issued on the basis that there were some reasonable grounds for the member to suspect that:

- a thing is on the premises that is relevant to a terrorism offence, whether or not the offence has occurred; and
- it is necessary exercise power under subsection in order to prevent the thing from being used in connection with a terrorism offence; and
- it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.¹³⁹

If an ex post facto search warrant is not granted, this should have the consequence that any evidence identified by the member of the AFP during the course of the search is not admissible in court proceedings. The exercise of this power by the AFP, especially any instances where an ex post facto search warrant has not been granted, should also be the subject of annual reports to the Commonwealth Parliament.

Recommendation 22

- (a) *Section 3UEA of the Crimes Act should be repealed.*
- (b) *In the alternative, a number of additional safeguards should be built into the regime, including a requirement that the AFP officer must go before a magistrate or judge as soon as possible after the search has been conducted of obtain an ex post facto search warrant.*

B *Sunset Clause (Crimes Act s 3UK)*

Section 3UK of the *Crimes Act* is an unusual sunset provision. Typically, a sunset clause stipulates that certain legislation or a provision of legislation expires on a particular date. If Parliament wishes the provisions to extend beyond that date, it must enact new legislation. It is as if the legislation or the provision had been repealed. In contrast, s 3UK stipulates that the

¹³⁸ Ben Golder, Andrew Lynch, Nicola McGarrity, Christopher Michaelsen, Edward Santo, Ben Teeger and George Williams, Submission, Attorney-General's Department, National Security Legislation Discussion Paper, 24 September 2009, 24; Emily Collett, Andrew Lynch, Nicola McGarrity, Christopher Michaelsen, Edward Santow and George Williams, Submission, Senate Legal and Constitutional Affairs Committee, National Security Legislation Amendment Bill 2010 (Cth), 30 April 2010, 34-35.

¹³⁹ Attorney-General's Department, *National Security Legislation Discussion Paper* (2009) 151-155

powers conferred by that Division may no longer be exercised ten years after the Division came into force. Any declarations made under section 3UJ in force on that date will expire. However, Division 3A is not repealed, and will remain on the statute books.

The government justified this unusual drafting technique by the claim that it was necessary for a ‘number of machinery type provisions’ to continue in operation.¹⁴⁰ However:

No clear definition was given as to what the Australian government meant by ‘machinery type provisions’, although one example could be provisions setting out how seized items are to be dealt with beyond the end of the 10 year period. This reasoning is unsustainable. The sunset clause could have been more carefully drafted so as to specifically preserve those provisions regarded as machinery type provisions. Alternatively, the provisions could have been allowed to expire in their entirety and the machinery type provisions re-enacted by parliament if it believed that it was necessary to do so.¹⁴¹

If Division 3A is allowed to lapse, then this would indicate Parliament views the powers as either unnecessary or disproportionate to their intended purpose. It is inappropriate to leave such legislation on the statute books. Further, there is also a danger that allowing provision to remain (dormant) on the statute books will enable them to be reactivated and extended without adequate Parliamentary debate. This deprives the sunset clause of much of its potential benefit; these clauses are supposed to guard against legislative inertia and the normalisation of extraordinary, emergency laws, by forcing regular reconsideration of their existence.

The length of the sunset period has also been criticised. In 2005, Professors Andrew Lynch, Ben Saul and George Williams submitted that:

[T]he nature and extent of the terrorist threat cannot possibly be predicted over the forthcoming ten year period, and the government has not presented evidence to suggest that the threat to Australia will be remain constant or will increase over that period. The uncertainty and speculation involved in such predictions point to the need for sunset clauses of reasonably short periods.¹⁴²

Section 3UK is also a far longer sunset clause than that (initially) attached to other comparable powers, such as the questioning and detention powers conferred on ASIO in 2003.¹⁴³ Yet, it is not the case that the shorter the sunset clause the better:

There are dangers associated with sunset clauses of too short a length. In particular, an assessment of legislation over a period of only a year or two is likely to be based on limited information about the operation of the legislation, and will therefore tend to understate its practical effects and impact upon fundamental human rights.¹⁴⁴

For this reason, a sunset clause closer to five years may be appropriate. This would enhance scrutiny, but allow sufficient time to have passed and evidence to have accumulated to enable Parliament to properly reconsider the legislation, if it wishes. It will also mean a federal election has taken place and a new Parliament can assess the legislation from a fresh perspective.

¹⁴⁰ Explanatory Memorandum to the Anti-Terrorism Bill (No 2) 2005 (no page numbers).

¹⁴¹ McGarrity, Gulati and Williams, ‘Sunset Clauses in Australian Anti-Terror Laws’ (2012) *Adelaide Law Review* (forthcoming).

¹⁴² Gilbert and Tobin Centre of Public Law, Submission No 80, Senate Legal and Constitutional Legislation Committee Inquiry into the Provisions of the Anti-Terrorism Bill (No 2) 2005, 10 November 2005, 24.

¹⁴³ Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 2005, 73 (Arch Bevis); 28 November 2005, 115 (Anthony Albanese).

¹⁴⁴ McGarrity, Gulati and Williams, ‘Sunset Clauses in Australian Anti-Terror Laws’ (2012) *Adelaide Law Review* (forthcoming).

Recommendation 23

If the search and seizure provisions are renewed in 2016, a new sunset clause should be included in that legislation. This sunset clause should provide that the relevant provisions cease to exist as at the expiry date (rather than remaining on the statute books). It should also provide for the expiry of the provisions after five (rather than 10) years.